termination or conversion charges to the other carrier or the customer. The standard time expected from disconnection of a live Exchange Service to the connection of the unbundled element to the new entrant's facilities should be 5 minutes. If the ILEC causes a customer's exchange service to be out of service due solely to its failure for more than 15 minutes, the ILEC should be required to waive the non-recurring charge for that unbundled element. If the competitor has ordered an interim number portability (INP) arrangement as part of an unbundled loop installation, the ILEC should coordinate implementation of INP with the loop installation.

Fourth, at the requesting carrier's discretion, each loop element should be delivered to the requesting carrier at the point of access[56] over an individual 2-wire or 4-wire hand-off, or in multiples of 24 over a digital DS-1 hand-off, in any combination or order the requesting carrier may specify, or through other technically feasible and economically comparable hand-off arrangements requested by that carrier (*e.g.*, SONET STS-1 hand-off). Where the ILEC utilizes digital loop carrier ("DLC")[57] technology to provision the loop element of a bundled exchange service to an end user customer who subsequently determines to assign that loop element to a competing carrier and receive exchange service from that other carrier via such link, the ILEC should be required to deliver the unbundled loop to the requesting carrier on an unintegrated basis, pursuant to the requesting

[56] The point of access may be any "technically feasible point" requested by the other carrier at which the ILEC provides access to its unbundled network element pursuant to Sec. 251(c)(3); this may include, among other options, a physical collocation cross-connection pursuant to Sec. 251(c)(6)

[57] *See* Bellcore TR-TSY-000008, *Digital Interface Between the SLC-96 Digital Loop Carrier System and Local Digital Switch* and TR-TSY-000303, *Integrated Digital Loop Carrier (IDLC) Requirements, Objectives, and Interface.*

carrier's chosen hand-off architecture, without a degradation of end user service or feature availability.[58]

(b) Local Switching Capability (¶¶ 98-103)

MFS anticipates that many, if not most, new entrants ultimately will want to provide their own switching platform because that resource will give them the greatest flexibility in designing service offerings customized for particular customers. Many switch-based capabilities have had very high margins because they have been considered vertical or optional services. Tone dialing is a prime example. For thirty years, local carriers have extracted a premium price for this service even though it is actually more economical to provide than the only commercial alternative—rotary dial. Now, voice dialing is emerging and the pricing relationship likely will change.

Thus, in spite of the margins available on some central office based services, new entrants may find valuable uses for local switch-based network elements in addition to the basic switching capabilities. Those functions (potential network elements) among others, include:

- access to E911 and operator services
- custom calling features:
    - call forwarding
    - call waiting
    - speed dial
    - conference calling
- virtual private line services including automatic forward on off-hook
- sequential and rotary hunt

[58] This proposed standard does not preclude an ILEC from continuing to use DLC technology in providing unbundled loop elements, as long as the equipment meets the technical specifications selected by the requesting carrier; but it does require that the loop be demultiplexed off the DLC transport facility before being delivered to the requesting carrier at the point of access.

- tone dial
- Centrex
- DID trunks
    - 1 way/2 way trunk groups
- toll and/or local access restrictions
- signaling
- numbering
- recording
- routing
- dial tone
- calling party identification

Because this list will continue to evolve, the Commission should consider this list as examples, not inclusive. A new entrant might find numerous ways to continue these functions to reach remote areas or to offer initial service before reaching a volume of business sufficient to justify investment in its own switch.

Since many of these services are software based, it is difficult to anticipate physical unbundling; but, the services themselves can be unbundled from each other. Here, as with other elements, the price for bundles of these services should be no less than the sum of the piece part prices.

Many of the services discussed above are end office based. Their functionality could be significantly impaired if they cannot pass through tandem offices. Therefore, in addition to the customer tandem switching and routing functions, the Commission should require that the other functions can be passed through or around any tandem switch.

(c) Local Transport and Special Access (¶¶ 104-106)

There can be no doubt that the Commission's proposal to "require unbundling of LEC facilities that correspond to the current interstate transport and special access rate elements," para.

105, is technically feasible. All of these rate elements are already required to be made available on an unbundled basis pursuant to the Commission's Expanded Interconnection Rules.

The Commission should clarify that ILECs are required by the Act (although MFS believes they were already required by the Expanded Interconnection decisions) to unbundle *all* transport and special access facilities, in any combination that may be requested by another carrier. Thus, for example, an ILEC must upon request provide unbundled interoffice transport facilities, without requiring that the other carrier purchase channel terminations or other elements along with the interoffice transport. ILECs must also provide unbundled access to SONET services and any other access service that they now offer or introduce in the future. They also must permit other carriers to provide transport to Commercial Mobile Radio Service providers, and to interconnect their competitive transport facilities with the ILEC's "Type 2" (or comparable) mobile radio interconnection services.[59]

(d) Databases and Signaling Systems (¶¶ 107-116)

Although the 1996 Act does specifically include databases and signaling systems in the definition of "network element," the Commission should note that interconnection to these facilities may be required in other contexts besides an unbundling request under Sec. 251(c)(3). In particular, when an ILEC interconnects its own facilities to out-of-band signaling or databases as part of providing and routing basic local exchange service, Sec. 251(c)(2) requires that comparable access be provided on nondiscriminatory terms to interconnecting carriers. The ILEC may not provide an

[59] For additional details on these services and on ILEC refusals to permit the forms of unbundled access described above, *see* MFS' Petition for Declaratory Ruling That Interconnector Access to LEC Services May Not Be Restricted, filed in CC Docket No. 91-141 on December 4, 1995.

inferior form of signaling to another carrier, or require the other carrier to pay additional charges for access to the same signaling that the ILEC uses in its own network. Rather, where access to signaling or databases is required in order to accomplish the "transport and termination" of traffic under Sec. 251(b)(5), any costs associated with these arrangements should be incorporated into the reciprocal compensation rate level, and should *not* be assessed separately upon the interconnecting carrier. If, however, a requesting carrier seeks access to ILEC signaling or databases for use in providing its own services, rather than for the completion of traffic routed through an interconnection arrangement, then the provisions of Sec. 251(c)(3) would govern.

d. Pricing of Interconnection, Collocation, and Unbundled Network Elements

(1) Commission's Authority to Set Pricing Principles (¶¶ 117-120)

MFS agrees with the tentative conclusions in paras. 117-120. Sec. 251(d)(1) expressly directs the Commission to "establish regulations to implement the requirements of this section." The requirements of Sec. 251 include a number of provisions requiring just and reasonable rates; moreover, Secs. 251(c)(2) and (c)(3) expressly require that rates be established in accordance with Sec. 252. The Commission therefore has authority to adopt rules implementing the pricing standards contained in Sec. 252(d). This does not imply that the Commission can dictate specific rate levels, since that function is specifically reserved to the States (except when Sec. 252(e)(5) applies); but the Commission's rules may prescribe standards and criteria to be applied by the States. The Commission can and should, as well, provide guidance to the States in carrying out their responsibilities under Sec. 252.

In para. 120, the Commission requests comments regarding jurisdictional separations of costs and revenues relating to co-carrier services. MFS strongly agrees that prices, terms, and conditions of Sec. 251 arrangements should not depend on whether a particular service or facility is classified as interstate or intrastate.[60] Further, the accounting treatment of costs associated with these arrangements should be consistent with the classification of the revenues. MFS opposes the use of Part 64 cost allocation rules, or similar procedures, for these costs, because those rules use a fully-allocated cost methodology. This methodology is inconsistent with the directive of Sec. 252(d)(1) that costs be "determined without reference to a rate-of-return or other rate-based proceeding[.]" Instead, the revenues and costs of Sec. 251 arrangements should be directly assigned to either the interstate or the State jurisdiction based on the "ten-percent" rule now used for dedicated facilities.[61]

(2) Statutory Language (¶¶ 121-122)

While the Commission has clear authority to establish national pricing principles under Sec. 251(d), and to ensure the resultant rates are "just, reasonable and nondiscriminatory" under Secs. 251(c) and 252(d)(1), these terms are themselves undefined. Historically, "just and reasonable" rates were defined in the context of monopoly service providers whose rates were set by government and not the market. "Just and reasonable" rates typically referred to regulator-set rates that were not so

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[60] *See* written *ex parte* presentations by MFS in CC Docket Nos. 91-141, 93-162 & 94-93, filed April 10 and April 19, 1996.

[61] *See* 47 CFR § 36.154(a). The use of this rule is appropriate for most Sec. 251 arrangements because they will involve the provision of dedicated, non-usage sensitive facilities. An exception might be appropriate, however, for wholesale services (Sec. 251(c)(4)) and reciprocal compensation for transport and termination (Sec. 251(b)(5)), where the jurisdictional treatment of revenues and costs could be based on the jurisdiction of the underlying service.

low that they constituted a taking and not so high that they amounted to monopoly prices.[62] Obviously, this definition, which springs from regulation of monopolies, is inappropriate for the regulation of the competitive market envisioned by the 1996 Act. Rather, the definitions of just, reasonable and non-discriminatory should be consistent with the 1996 Act's intent to promote competition throughout all segments of the telecommunications industry. They might be interpreted to address the interests of incumbent carriers, end-users and competitors. *Just* might mean that the incumbent carrier should have an opportunity to establish its own rates and to recover as much of its costs as competition will permit. *Reasonable* should mean that the incumbent's overall earnings should remain with the range permitted by each state whether that is based on rate-of-return, price caps or some other methodology. And, *nondiscriminatory* should mean that every service, feature or function that an incumbent local carrier provides to any customer—whether end-user or another carrier—should be disaggregated into its component elements and priced with a separate rate for each element so that each element can be unbundled from every other element and be made available to any other customer on either a standalone or bundled basis.

Determination of specific rate levels is delegated to the various State commissions under Sec. 252(d), to be "determined without reference to a rate-of-return or other rate-based proceeding." This task is further complicated by the Commission's correct, but revolutionary, tentative conclusion that these rates should be based on unseparated costs—that is, without jurisdictional distinctions. Traditional ratemaking methodologies that develop rates based on a monopoly provider's actual costs do not meet this combination of tests. The benchmark cost model being proposed in the

[62] Courts have described this as a "zone of reasonableness" within which utility rates must fall. *See, e.g., In re Permian Basin Rate Cases*, 390 U.S. 747, 768-70 (1968).

universal service proceeding now being conducted in parallel with this proceeding (CC Docket 96-45) may be the best analog for developing prices independent of the incumbent's revenue requirement. While that model may be inadequate to use as a basis to develop specific rate elements, it will allow the Commission to establish cost relationships between the unbundled elements that may prove useful to test the reasonableness of the ultimate rates.

Pricing is the quintessential proprietary business exercise in a competitive market. In the instant situation, each carrier faces unique operating conditions, has different business strategies and anticipates varying degrees of competition. Were the local telecommunications markets fully competitive, Commission direction would be unnecessary. Here, however, local competition is nascent and Congress has directed the Commission to replace an old familiar rate-making regime with new rules that will stimulate competition. In these circumstances, the Commission should step away from its traditional regulatory tools (including separations, accounting and costing methodologies) and adopt market-driven methods of regulating the monopoly incumbents. While this step will require placing great faith in the power of competition and technology, it is essential if the Nation is to encourage widespread development of viable local competition in the near future and, at the same time, to substantially reduce regulation of this industry.

For this market-driven concept to work, the Commission must adopt a regulatory strategy that forces incumbents to respond to market tensions rather than to continue relying on (or hiding behind) outdated regulatory rules and procedures, many of which they created. To enable this strategy the Commission should establish the following broad immutable standards driven by the statutory language and within which the States can exercise their pricing authority.

- Incumbent local exchange carriers should be required to disaggregate every service into a common list of network elements (including facilities, operations support systems, overheads and return);
- Each network element should be separable, severable, able to be incorporated into competing carrier networks and have its own rate;
- Wholesale rates should equal or exceed the sum of the rates of the underlying network elements, and wholesale rates must be less than or equal to retail rates;
- All incumbent local carrier rates, whether in tariffs or contracts (including all contract arrangements with individual customers and contracts with other carriers) should be filed with the appropriate State commission and be available for public examination (including copying) during regular business hours;
- After a brief transition period, any potential customer of the incumbent local exchange carrier (whether end user or carrier) should be able to obtain any service or network element at any tariff or contract rate and use that service or element for any purpose—during the transition period, State commissions may restrict resale only of services or network elements priced for the residential market;
- Incumbent LECs should be allowed to reconfigure rates no more frequently than annually; and
- Costs of network elements may be recovered through multiple rate elements.

For the reasons explained at pages 58 *et seq.*, below, these pricing principles should apply equally to unbundled network elements and to all bundles of network elements. Given the statutory language, these same rules should apply for interconnection agreements (of which collocation is but one form).

(3) Rate Levels

(a) LRIC-Based Pricing Methodology (¶¶ 126-133)

The Commission observes that economists agree rates based on Long Run Incremental Costs (LRIC) generally give appropriate price signals to both customers and competitors. Unfortunately, as the Commission's questions here demonstrate, the economists seldom agree even on the definition of LRIC, let alone the best methods to complete an LRIC study. These studies usually are expensive to conduct, almost impossible to audit or review and are very subjective. And, as the Commission observes, the necessary data is under the exclusive control of the party subject to the requirement.

The Commission also observes that it needs some method to allocate joint and common costs, because no carrier can provide every service at the LRIC cost and long survive.[63] Economists find even less common ground when discussing how best to allocate these costs. This pricing decision becomes even more difficult when the costs can be recovered from many services. In fact,

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[63] As a technical matter, prices set at LRIC will fail to cover total costs only if the firm is operating under conditions of continuing economies of scale (i.e., average costs are lower if the firm incrementally expands its output). If a firm operates under constant returns to scale or increasing returns to scale, prices set at LRIC will cover total costs. It is often <u>assumed</u>, but never demonstrated empirically, that telephone companies experience continuing economies of scale or that they ever have operated as efficiently as they might in an effectively competitive market. It is worth noting, however, that the proportionate share of joint and common costs should be much lower if costs are analyzed on a network element basis than on a service-by-service basis. Many costs that are associated with particular network facilities and equipment cannot be directly attributed to a particular service, because many services make use of the common facilities and equipment. But, if the network facilities and equipment themselves are identified and priced as unbundled elements, many of these costs will be directly attributable to the provision of these elements and therefore will be included in LRIC, rather than in joint and common costs.

there is no "best" answer. The answer is driven by the objectives and elasticities of demand as perceived by the individual competitors. Because the mechanics are both difficult and arbitrary and because Congress directed the Commission to look beyond traditional rate setting methodologies, the Commission should reject LRIC and its progeny as rate making tools.

In para. 133, the Commission asks if rates should be established based on some as yet undefined geographical or class-of-service basis. Such differentiators (and others like distance sensitivity, time-of-day pricing or technology employed) exist today and likely will remain.

Congress has mandated that interexchange carriers use national pricing. A similar requirement for geographic averaging should be imposed on ILECs to avoid the potential that ILECs will engage in anticompetitive strategic pricing—pricing low in competitive markets and setting high rates in less competitive markets where competitive entry is restricted.[64] Since states will approve local carrier pricing, the maximum geographic area over which to average would seem to be statewide. Other alternatives include LATA-wide averaging, census block averaging, exchange specific pricing and averaging based on access line density. In order to address its concern that widespread averaging may force low cost areas to subsidize high cost areas, the Commission might consider consolidating exchange costs into a small number of statewide costing bands based on access line density. Each incumbent carrier would assign each of its exchanges in a state to one of these bands and could develop different statewide rates for each network element and service in each

[64] For a description of such anticompetitive strategic pricing in multiproduct markets, see B. Albery and M. Sievers, *Strategic Allocation of Overhead: The Application of Traditional Predation Tests to Multiproduct Firms*, 60 Antitrust L.J. 757 (1991-92).

band.[65] The Commission should not adopt rating areas smaller than individual exchanges, should treat rate centers served from the same central office as one exchange, and should require the incumbent with all of its subsidiaries or affiliates to develop uniform rates by band based on statewide aggregated cost data. In the short term, state commissions will have to remain vigilant to assure joint and common costs are not over- assigned to high cost exchanges. In the longer term, incumbents' pricing flexibility will be constrained by now emerging potential competing services, including both new "landline" entrants and CMRS carriers. This grouping mechanism should mirror the definitions ultimately adopted in the universal service proceeding.

Network elements should be priced without considering class-of-service differentials. While the Act permits restrictions on resale of services based on "category of customers," Sec. 251(c)(4)(B), it does not seem to contemplate pricing network elements based on class-of-service. Neither should the Commission. And, as discussed more fully below, the Commission should permit resale restrictions only on residential services and only for a brief transition period, except for those services, such as Lifeline, that receive explicit universal service subsidies. All other universal service support will be carrier independent.

The Commission also asks if rates should be based on the technologies employed. Again, the answer is no. The choice of which technologies to use should be left to the individual carrier just as they are today permitted to determine the balance between switching and loop lengths and all other manner of operating concerns. Individual customers, whether large or small, end-user or

[65] Some states have already done this. Bell Atlantic has established two density-based rate classes in Maryland and four in Pennsylvania. Similarly, Ameritech has established three rate classes in Illinois.

carrier, should not be penalized or rewarded because the incumbent carrier decided to use a particular technology or locate a central office in a particular place to best serve its needs. Of course, as competition emerges, the incumbents will have even greater incentives to use technologies that best meet their customers' needs and minimizes costs.

In summary, both the Commission and the industry need simpler, less intrusive and less arbitrary techniques than LRIC studies to test whether incumbent local exchange carrier rates are just, reasonable and nondiscriminatory.

(b) Proxy-Based Outer Bounds for Reasonable Rates (¶¶ 134-143)

The Commission asks whether it should develop, derive or adopt some sort of "proxy" of costs upon which to establish an "outer boundary" against which to test incumbent local carrier rates for reasonableness and whether a rate ceiling based on these proxies would protect against excessive rates (para. 134). The Commission should reject this approach, because the proxies might not produce the desired effect and would suffer from the same assumption and allocation deficiencies as do LRIC studies.[66]

Rather, the Commission should rely on carriers to set their own prices and on the market to discipline the carriers. This approach is entirely dependent on the Commission adopting and

[66] Proxy rates based on existing interstate access charges, as suggested in para. 139, would be particularly inimical to the goals and specific requirements of the 1996 Act. Existing access charges were based on rate-of-return methodologies. Even those rates that have been governed by price caps for several years were originally set in rate-of-return proceedings, and then indexed annually for changes in inflation. The Act specifically prohibits the use of "rate-based" methodologies in setting rates for unbundled elements, and the Commission should not attempt to accomplish indirectly (by relying on price caps or other "fig leaves" to mask the rate-of-return origin of access charges, or by calling these rates "proxies") what the statute expressly bars it from doing directly.

enforcing the standards outlined above, including mandatory public disclosure of all tariffs and contracts between the incumbent local exchange carriers and any customer or other carrier including interexchange carriers, other incumbent local exchange carriers and CMRS carriers; unrestricted resale and sharing of any service or network element for any use including exchange access at the rates charged in any tariff or contract (recognizing that when contracts have volume or term commitments, these commitments cannot be customer or location specific); and, pricing based on the sum of prices of all subtending network elements. These items are further discussed below.

Prices based on these principles will satisfy the three pronged test proposed by the Commission in para. 135. First, pricing in this manner will make it possible for competitors to enter the local exchange market if in fact they can produce services at a lower cost or aggregate sufficient smaller customers to qualify for ILEC volume rates. These volume rates currently are offered to the ILEC's best business customers, but are not available for unbundled and unrestricted resale. For example, ILECs typically restrict resale and sharing of their services to measured business services offered only on contiguous properties while they allow individual customers to buy flat rate services or aggregate demand over multiple locations. ILEC centrex business services frequently have loops priced substantially below loop prices available to other customers. These same centrex rates often include unlimited intra-customer central office calling even when other customers have to pay measured rates for local calling. Some ILECs even rebate the Commission mandated subscriber line charges for Centrex customers. The unbundling and resale provisions of the proposed market driven system will make the subtending loop and switching network element prices available to other providers so that they can incorporate loops and switching based on centrex prices into competing offerings.

This same example illustrates how prices based on the proposed market driven standards also satisfy the Commission's second test. If centrex prices are too low, the ILECs will quickly have incentives to raise them. If centrex prices are correct, the ILECs may have to reduce other prices in order to remain competitive. In either event, the ILECs also must weigh the impact on their end-users customers. The tension created by unrestricted resale was one of the most significant factors driving interexchange competition. There is every reason to expect a similar result in local service so long as the Commission requires disclosure of all tariffs and contracts and enforces the resale and unbundling provisions of this legislation.

As for the third test, the proposed market-based system does not rely on complicated and controversial costing analyses. Rather, it lets each carrier develop its own pricing schemes and exposes these resultant prices to all market participants (both end-users and competing carriers). These parties will see the range of services and network elements available, can help this Commission and the state commissions ferret out anomalies and can make informed decisions about which services or elements to obtain from the incumbent carriers and which to procure elsewhere or provide for themselves.

(c) Other Issues (¶¶ 144-148)

The Commission asks whether historical costs should be relevant and whether incumbent local exchange carriers can claim an "entitlement" to recover embedded costs. Historical costs are not relevant. Incumbents should be allowed to recover whatever costs market-driven prices will cover—no less and no more.[67] MFS observes both that AT&T was forced by competition several times to "write down" its books and improve its technologies, and that effective local competition will take some years to develop. Incumbent local carriers should get on with whatever repricing and restructuring they feel they need to compete in order to compete under the market driven pricing system proposed here.

The Commission also asks how universal service subsidies should be reflected in any costing scheme. As many have discussed in the parallel universal service proceeding, the bulk of universal service subsidies should flow to end-users (both urban and rural) to use as full or partial payment for the local services they obtain from the local carrier of their choice (mechanically, the carrier may collect the credit from an independent administrator rather than from the end-user, but in any event, no carrier is "entitled" to or automatically receives an end-user's subsidy). The carrier's rates will not be discounted to reflect the end-user subsidy. However, some carriers may qualify as high cost carriers and may receive some funding from the universal service fund as well as from customers. These carriers should base their service pricing on total costs less the universal service support, but should not be required to flow that support through to any specific rate or customer set. And, as discussed at length in the parallel proceeding, all carriers should be required to support the universal service fund based on a uniform percentage of gross revenues.

At para. 147 and again at para. 164, the Commission notes these changes may significantly impact its access charge scheme. This is correct. The Commission should not impose any

[67] For this reason, MFS agrees with the Commission's tentative conclusion in para. 148 that ECPR or equivalent methodologies are inconsistent with the intent of the legislation and that State commissions should be precluded from using this methodology to set prices.

limitations on how any customers (whether end-users, competing local carriers, interexchange carriers or other carriers) use the services or network elements they procure from incumbent local exchange carriers. In the short term, this may have dramatic impacts on how some services have been priced. That dislocation, if any, is an essential step toward a fully competitive, domestic telecommunications industry. If some local services have been unduly subsidized by interexchange access charges, local competition has been thwarted. That condition cannot continue. Some incumbent prices may have to rise or they may have to accept less robust margins. That, too, is an inevitable result of this historic legislation, if the Commission maintains the courage of its tentative conclusions. But, both competitors and end-users will benefit from the change.

(4) Rate Structure (¶¶ 149-154)

The Commission has observed correctly in para. 149 that the ILECs' rate structures will influence the decisions of new entrants to purchase and use interconnection services and unbundled network elements just as dramatically as actual rate levels. For this reason, as well as to ensure that State rate policies comply with the Sec. 251(d) pricing standards that Congress has determined are necessary to foster the development of competition, the Commission should require states to adopt pricing structures that, at a minimum, prohibit the use of usage sensitive rates to recover the costs of dedicated facilities, such as unbundled loops, that are not traffic sensitive. At least one state—Texas—enacted legislation last year requiring ILECs to price unbundled loops on a usage-sensitive basis.[68] The Texas Public Utility Commission has interpreted this provision to mean that ILECs may charge their competitors for each originating and terminating minute of traffic that passes over an unbundled loop,[69] despite the fact that the cost of the loop does not vary with traffic volume, and despite the fact that Texas does not permit usage sensitive local rates.

This type of rate structure is harmful to competition because it allows ILECs to discriminate—to overcharge new entrants with high traffic volumes and to undercharge remaining customers with lower traffic volumes for the use of fixed cost facilities. By sending improper price signals, Texas' usage sensitive rate structure will discourage new entrants and the efficient use of loop facilities. Although there is no real cost to sending an additional minute of traffic over an unbundled loop, usage sensitive rates will create disincentives for customers to use their telephones and/or to subscribe to the services of a competitive carrier who is dependent on the ILEC's unbundled loops. In order to eliminate such perverse incentives, it is imperative that the Commission adopt rate structure principles for states to apply in meeting the pricing requirements of Section 251, and preclude enforcement of inconsistent State practices pursuant to Secs. 251(d)(3) and 253(d). The Texas statute requiring usage-sensitive pricing of unbundled loops should be specifically pre-empted.

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[68] Section 3.453(c)(1) of the Texas Public Utility Regulatory Act of 1995, Vernon's Ann. Civ. St. art. 1446c-0, § 3.453(c)(1), provides that the Public Utility Commission "may only approve a usage sensitive rate that recovers the total long run incremental cost of the loop on an unseparated basis."

[69] *See Applications of Southwestern Bell Telephone Co. et al. For Usage Sensitive Loop Resale Tariffs Pursuant To PURA 1995 § 3.453*, PUC Docket No. 14659, Order of Remand at 4-5 (TX PUC April 11, 1996).

In para. 154, the Commission requests comments on whether volume and term discounts should apply to unbundled elements and services. At a minimum, if an ILEC offers volume and/or term discounts to end-user purchasers of a bundled service, it should ordinarily be required to offer discounts of at least similar magnitude to purchasers of an unbundled element that is used in providing that service. It should be presumed that the discount offered to retail purchasers reflects underlying cost savings in the provision of the bundled service on a volume or term basis, and the ILEC should have the burden of demonstrating that the volume or term cost characteristics of an unbundled element are different from those of the bundled service.[70] A primary reason for the Commission to require public access to all ILEC end user tariffs and contracts is so these retail rates can be used as new price caps.

(5) Discrimination (¶¶ 155-156)

MFS submits that Congress deliberately used the word "nondiscriminatory" in Secs. 251 and 252, rather than the phrase "unreasonable discrimination" as in Sec. 202(a), in order to create a more stringent legal standard for ILEC pricing than had previously existed.[71] This strict standard was necessary to prevent the ILECs from circumventing the pro-competitive goals of the 1996 Act.

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[70] In addition, ILECs may be required to offer volume and/or term discounts for other unbundled elements, if the cost characteristics of the particular network element justify such discounts. This determination will necessarily depend on the facts relating to specific elements, and probably cannot be addressed through rules of general applicability.

[71] Significantly, the original Senate Commerce Committee print of S.652, issued before mark-up on Jan. 31, 1995, provided in Section 251(a) that a common carrier had a duty to provide for interconnection and related services "at rates that are just and reasonable *and not unjustly or unreasonably discriminatory* . . . ." In later versions of the legislation, the emphasized language was replaced by the word "nondiscriminatory," which strongly suggests that the change in wording was purposeful

Congress recognized that interconnection to ILEC facilities and access to ILEC network elements are indispensable if competition is to exist in the local exchange.[72] Discrimination in the terms of access to these essential facilities would be just as deadly to competition as complete denial of access.[73] "Nondiscriminatory" means that all carriers receiving the same service or access to the same network element must be charged the same price, although certainly there may (and indeed should) be differences in pricing where there are differences in the services or functionalities being provided to two carriers. In MFS' view, a volume or term discount is nondiscriminatory *only* if the provision of the service in volume, or on a long-term basis, results in identifiable differences in cost as compared to providing the service in individual units on a short-term basis.[74]

(6) Relationship to Existing State Regulation and Agreements (¶ 157)

In para. 157, the Commission requests comments regarding Sec. 251(d)(3). As explained at page 5, above, MFS urges the Commission in this proceeding to establish uniform, nationwide rules establishing only the *minimum* terms that ILECs will be required to offer in order to comply with Sec. 251. This approach will allow those States that have already established their own access and interconnection policies to continue to enforce and effectuate those policies, as intended by

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[72] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 71 (1995) (interconnection "is a cornerstone principle of common carriage").

[73] *Id.* at 73 (pricing standard for interconnection "guards against anti-competitive behavior by requiring a LEC to assess the same charge to itself as it charges others").

[74] As discussed at page 63, above, however, volume and term discounts should be available to all carriers accessing unbundled network elements whenever those elements are used by the ILEC in providing retail services that have volume or term discount price structures. Failure to make discounts available to competitors under these circumstances would in itself be a form of prohibited discrimination.

Congress, as long as they are consistent with and not dilutive of the minimum standards imposed by the 1996 Act.

e. Interexchange Services, Commercial Mobile Radio Services, and Non-Competing Neighboring LECs

(1) Interexchange Services (¶¶ 159-165)

MFS concurs with the Commission's interpretation of Sec. 251(c)(2) as set forth in paras. 159-161. A carrier that offers exclusively interexchange service would not be entitled to interconnection under this provision, because it is not engaged in the provision of "telephone exchange service or exchange access service." Of course, an interexchange carrier would continue to be entitled to interconnect under the provisions of Sec. 201(a), which are expressly preserved by Sec. 251(i). A carrier (such as MFS) that provides both local and interexchange services would be entitled to interconnection under Sec. 251(c)(2) with respect to its local (and exchange access) services, and under Sec. 201(a) with respect to its interexchange services.[75]

In paras. 164-165, the Commission seeks comment on whether carriers may obtain access to unbundled network elements as a means of originating and terminating *interexchange* traffic, thereby avoiding the payment of Part 69 access charges. MFS submits that the Commission could

[75] This implies that different rates and terms may apply to interconnection arrangements depending upon the purpose for which they are used. This would seem to be consistent with the reference to "*reciprocal* compensation arrangements" in Sec. 251(b)(5), which applies only when the interconnecting carrier is *reciprocally* terminating local exchange (or exchange access) traffic. But ILECs must also comply with the requirement of Sec. 251(c)(2)(C) that interconnection be at least equal in quality to what the ILEC provides to itself. Therefore, if the ILEC itself delivers both local and non-local traffic (such as intraLATA toll calls) to its switches over common trunk groups or other common interconnection arrangements (as is common practice in the industry), it must provide the same opportunity to its competitors. The ILEC may not require segregation of traffic on separate facilities, which would impose additional costs and operating inefficiencies on its competitors.

not prohibit a carrier from passing interstate, interexchange traffic over an unbundled network element—that is exactly what the ILECs do in providing exchange access service, and it would turn the statutory scheme on its head if others were prevented from doing the same. Nonetheless, as explained at pages 37-40, above, a carrier desiring access to unbundled elements must provide some material elements of the service (in this case, the origination and termination of interexchange calls over local exchange facilities) over its own network; otherwise, there would be no distinction between unbundled access and resale of wholesale services. MFS also agrees with the argument presented in para. 164 concerning the nature of an unbundled element. By statutory definition, a network element is composed of "facilities or equipment" and functions performed by identifiable facilities or equipment. A telecommunications carrier cannot use Sec. 251(c)(3) to obtain a rate element of an existing tariffed service (*e.g.*, Part 69 local switching or common line service) at a lower cost; rather, it may obtain switching or loop capacity (for example) which it can use to extend its own network to serve a customer. In order to meet market demand, the carrier using the unbundled element will have to be capable of providing whatever services the customer requires, which likely will not be limited to interexchange calling.

(3) Non-Competing Neighboring LECs (¶¶ 170-71)

The plain language of Sec. 251(c)(2) applies to interconnection provided by an ILEC to "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access . . . ." This language on its face encompasses interconnection between "non-competing neighboring LECs" as described in para. 170. Nonetheless, the Commission suggests in para. 171 that this subsection falls within a provision designed to promote competition, and therefore could be construed as being limited to competing carriers. Although MFS agrees that statutory provisions must be interpreted in context and with due regard for Congressional intent, interpretation should not be used as a device to negate the plain language of the Act.[76] Congress knew how to refer specifically to competing providers when it chose to do so, as in Secs. 251(b)(3) and (b)(4), and it did not choose to limit subsection (c)(2) in this manner. Moreover, such a limitation would have been unwise, because neighboring LECs that do not compete against each other today may do so tomorrow.[77] It would be extremely difficult for the Commission and the States to monitor which LECs were competing against each other and which were not, and to ensure that all interconnection agreements among competing carriers had in fact been filed with the State as required by Sec. 252(e), (h) and (i). Further, many neighboring ILECs have extended area service agreements that today establish presumptively compensatory arrangements between non-affiliates. By avoiding any arbitrary limitation to "competing" carriers, the Act establishes a more easily enforceable bright-line rule encompassing all interconnection arrangements between local exchange carriers.

The Commission should specifically require that pre-enactment agreements between neighboring ILECs be filed in accordance with Sec. 252(e) by a date certain, such as 20 days after the release of an order directing such filing. The ILECs have been under an obligation since February 8, 1996, to file these agreements, but most have not yet done so, and the statute itself

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[76] *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[77] Indeed, it has been reported that LEC subsidiaries of Sprint and BellSouth may already be competing against each other in the Orlando, Florida, area. <u>ALEC Status Achieved in Florida</u>, *Telco Business Report* vol. 13, no. 10 at 11 (May 6, 1996).

contains no explicit filing deadline. The agreements themselves should be readily available in the records of the ILECs, and so a relatively short period for compliance (20 days) seems appropriate. Moreover, the Commission should consider issuing an interim order requiring the filing of these agreements *before* taking action on the other issues in this docket. The agreements among neighboring ILECs are certain to be of great importance in the negotiation of new interconnection arrangements between ILECs and new entrants, and in the arbitration of any disputes among these carriers, because they will be directly relevant in determining whether or not any proposed arrangements are technically feasible and non-discriminatory. Arbitrations may commence as early as June 24, 1996 (which is the first business day after the 135th day from the enactment of the 1996 Act), and it would be highly desirable to have the pre-enactment agreements available to interested parties before that date.

3. Resale Obligations of Incumbent LECs

b. Resale Services and Conditions (¶¶ 174-177)

The elimination of restrictions on resale of all telecommunications services is one of the primary tools employed by Congress to effectuate a restructuring of the local exchange market. This Commission recognized twenty years ago that resale restrictions were a primary barrier to competitive entry in the interexchange market, and its decisive actions to eliminate those restrictions were a key factor in converting that market from a complete monopoly to today's diverse competitive arena.[78] Similarly, unrestricted resale of local exchange services is essential if the Commission is to achieve the Congressional goal of extending competition into the local market and allowing the forces of supply and demand to operate freely within that market. In addition, as explained at pages 50 *et seq.* above, unrestricted resale is a critical component of the market-driven pricing strategy for network elements that the Commission should adopt. For these reasons, MFS agrees with the Commission's view that "the range of permissible restrictions [on resale] should be quite narrow." Para. 175. MFS also submits that, because Secs. 251(c)(4)(B) and 251(b)(1) are quite similar in terms, the Commission should interpret these two provisions the same way.[79]

Sec. 251(c)(4)(B) plainly states that an ILEC has a duty "not to prohibit, *and* not to impose unreasonable or discriminatory conditions or limitations on, the resale of [any retail] telecommunications service . . . ." (Emphasis added.) Congress plainly drew a distinction between a "prohibit[ion]" of resale, which is absolutely banned, and a "condition[] or limitation[] on . . . resale[,]" which is prohibited only if "unreasonable or discriminatory." Sec. 251(b)(1) contains

[78] *See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Memorandum Opinion and Order, 62 FCC 2d 588 (1977); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, CC Docket No. 80-54, Report and Order, 83 FCC 2d 167 (1980); *American Tel. and Tel. Co. Restrictions on Resale and Sharing of Private Line Service to Form Equivalents or Message Telecommunications Service and Wide Area Telecommunications Service*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 82-44, 88 FCC 2d 1406 (1982); *American Tel. and Tel. Co. and the Bell System Operating Cos. Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications*, CC Docket No. 83-40, Memorandum Opinion and Order, 94 FCC 2d 1110 (1983).

[79] In this section, MFS is addressing only which services should be available for resale, and whether any restrictions or conditions on such resale should be permitted. Pricing of wholesale services is addressed separately in the following section; and, since Sec. 251(b)(1) does *not* contain any provision comparable to Sec. 251(c)(4)(A) concerning wholesale rates, the latter discussion will be applicable only to ILEC services.